State of any portion of its police power—but because the power reserved by the State might be said to be reserved subject to diminution when Congress steps in. And, in one case, the State act is spoken of as "annulled."[18] But the language generally used indicates that the police power is undiminished, though its operation upon subjects of commerce is obstructed. On this latter theory, State legislation is merely suspended, and an act passed during the life of a law of Congress is not void, but becomes operative when Congress repeals its law. The question has not been squarely presented to the Supreme Court, but such is the view of the State courts.[19] And it receives support from the position taken by the Supreme Court with reference to the Wilson Act of 1890 in the case of *In re Rahrer*,[20] although that case does not necessarily decide anything further than that Congress may declare that interstate commerce in a certain article ceases when the article reaches the importer's hands—perhaps on the same principle that it may, when reasonable, declare an article of doubtful character an unfit subject of commerce—and that sales by the importer come within the terms of the general law prohibiting intrastate sales. A result similar to that in the New York cases above cited[19] has been reached in the case of bankruptcy legislation, analogous since the passage of such laws by a State may be regarded as an exercise of its police power under the now accepted definition of the term.[21]

HARDSHIP AS A DEFENSE TO SPECIFIC PERFORMANCE.—Those cases in which equity uses its "discretionary power" to refuse specific enforcement of a contract, which do not fall under the regular categories of fraud, mistake, etc., are collected by text writers under the general statement "that equity will not specifically enforce a contract that will inflict hardship on the defendant."[1] But the cases cited lend only partial support to this proposition; for, on the one hand, some kinds of hardship do not bar relief, as, for example, the defendant's insolvency,[2] or his loss of all benefit from the contract,[3] and, on the other hand, many cases of so-called "hardship" involve no hardship at all in the ordinary sense.[4] An examination of the cases shows that they really establish the narrower and more definite principle that equity will not enforce an unequal contract—one in which the detriment to the defendant is much greater than his benefit. The modern rule that inadequacy of consideration, i. e., inequality of market values, does not prevent enforcement[5] is only an apparent exception to this principle, for since the value of the consideration to the parties depends

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[18]*Per* Matthews, J., in Smith *v.* Alabama, *supra.*

[19]Sturgis *v.* Stofford (1871) 45 N. Y. 446; Henderson *v.* Stofford (1874) 59 N. Y. 131.

[20](1890) 140 U. S. 545. See Prentice, Commerce Clause, 142.

[21]Tua *v.* Carriere (1885) 117 U. S. 201, 209; Butler *v.* Goreley (1892) 146 U. S. 303, 314.

[1]Story, Eq. (13th Ed.) 90; Pom. Spec. Perf. (2nd Ed.) 9; Fry, Spec. Perf. (3rd Am. Ed.) 193.

[2]Parker *v.* Garrison (1871) 61 Ill. 250.

[3]See Adams *v.* Weare (1784) 1 Bro. Ch. 567.

[4]See City of London *v.* Nash, *infra.*

[5]See Seymour *v.* Delaney (N. Y. 1822) 6 Johns. Ch. 222, rev. 3 Cow. 445, 531, 534. But see Columbus etc. Ry. Co. *v.* Ohio Southern Ry. Co. (1885) 1 Oh. Cir. Ct. 275, at 280; Bates Machine Co. *v.* Bates (1898) 87 Ill. App. 225, 236.

upon their particular circumstances and does not necessarily coincide with its market value, inadequacy of consideration alone is not conclusive of real inequality. The cases of so-called "hardship" show that, when inequality is definitely established by supplementing inadequacy of consideration with evidence that the defendant was, for any one of three reasons, not in a position to secure an equal return for his promise, the contract will not be specifically enforced.

Such inability to protect his own interest may be due in the first place to the defendant's mental inferiority, as, for example, not only his insanity, infancy or duress, but his weakmindedness,[6] youth and inexperience,[7] drunkenness,[8] lack of advice, in the case of a solitary invalid,[9] business inexperience in the case of a married woman,[10] intimate relationship when it prevents due caution, which is sometimes even grounds for rescission,[11] old age and fear of being dispossessed by the plaintiff,[12] or recklessness caused by a prevailing fever of speculation.[13] It may be due, in the second place, to the fact that the defendant's means of knowledge of the subject matter were inferior in important respects to the plaintiff's, because of the plaintiff's misrepresentation, fraudulent concealment, or even his mere failure to disclose, when under no duty to do so, important facts which the defendant had only inferior means of discovering.[14] It may, in the third place, be due to events or discoveries unforeseen to either party at the date of the contract, which have rendered it unequal. The decisions hinging on events subsequent to the contract seem logical if inequality is recognized as the test. Since every contract is to a certain extent a speculation, and only those events or disclosures destroy its equality which lie entirely outside of the intended speculation, the test of equality is, therefore, whether the contingency was part of the risk reasonably foreseeable by the parties at the time of contracting.[15] Thus a contract to rent a mine, found to be worthless, was enforced because of the frankly speculative nature of mining contracts,[16] although the same court had four years previously refused to enforce a sale of a manor which was found to include certain valuable lands not regarded by the parties as part of the subject matter.[17] In the leading American case[18] it was held that an unexpected appreciation in the value of property was, but that payment in depreciated paper currency was not, part of the vendor's risk as contemplated by the parties. It was held in a parallel case that depreciation of confederate currency was a risk assumed by the defendant when he contracted to be paid in that medium.[19] Specific

[6]Henderson *v.* Hayes (Pa. 1834) 2 Watts. 148, 157.
[7]Gasque *v.* Small (S. C. 1848) 2 Strobh. Eq. 72.
[8]Cragg *v.* Holme (1811) 18 Ves. 14 n. 3.
[9]Cuff *v.* Dorland (N. Y. 1857) 50 Barb. 438.
[10]Friend *v.* Lamb (1893) 152 Pa. 529.
[11]See 9 COLUMBIA LAW REVIEW 83.
[12]Blackwilder *v.* Loveless (1852) 21 Ala. 371.
[13]McCarty *v.* Kyle (Tenn, 1867) 4 Coldw. 348.
[14]6 Pom. Eq. Jur. § 787; Ellard *v.* Llandoff (1810) 1 Ball. & B. 241; Markgrav *v.* Muir (1874) 57 N. Y. 155.
[15]But see *contra*, Kelley *v.* York Cliffs Co. (1900) 94 Me. 374 (*semble*).
[16]Haywood *v.* Cope (1858) 25 Beav. 140.
[17]Baxendale *v.* Seale (1854) 19 Beav. 601.
[18]Willard *v.* Tayloe (1869) 8 Wall. 557.
[19]Hale *v.* Wilkinson (Va. 1871) 21 Gratt. 75.

performance has been denied in cases when it would, contrary to expectations at the time of contracting, endanger the plaintiff's life,[20] subject him to criminal prosecution,[21] or to liability for damage caused by a great flood.[22] On the other hand, it was properly held in a recent case, *Bradley* v. *Heyward* (1908) 164 Fed. 107, in which the defendant resisted enforcement of a contract to sell all the phosphate under her land to the plaintiff, on the ground of his discovery of a quantity worth three times the purchase price, that, since the defendant must have understood the speculative nature of the contract, it should be enforced.

With the exception of cases which are really based on a mistake in reducing a verbal contract to writing,[24] the few cases of "hardship" which do not involve inequality, involve as little real hardship. Two of them can be explained, but not justified, as unprecedented extensions of the doctrine of "unclean hands."[25] And in most of the others, the actual damage to the plaintiff is so slight, or "merely technical,"[26] as in the case in which the defendant who had contracted to rebuild houses had partly rebuilt and extensively repaired them,[27] or that in which a railroad had contracted to tunnel its embankment for the benefit of land of small value,[28] or in which by a change in the character of the district the purpose of a restrictive covenant had become unattainable,[29] that the court refuses to be bound by the manifest fiction that damages are inadequate, and denies specific enforcement, sometimes further justifying its attitude on the ground that specific performance would entail a "public loss."[27]

SAVINGS BANK TRUSTS IN NEW YORK.—The New York law of savings bank deposits in trust illustrates both a response of the courts to the demand of business conditions and their reluctance to overrule previous decisions. It was held in *Martin* v. *Funk*[1] that a deposit by one person in his own name as trustee for another created a valid trust. The question was raised but left unanswered whether surrounding circumstances might not be shown to vary the apparent intention of the depositor. Later, in discussing that question, Andrews, J., said that the character of such a transaction, as creating a trust is not conclusively established by the mere fact of the deposit.[2] In a case in which a *gift* of a bank deposit was sought to be established,[3] he applied this view. Attention was called to the com-

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[20]Williamson *v.* Dils (1903) 114 Ky. 962.

[21]Hope *v.* Walter, L. R. [1900] 1 Ch. 257.

[22]Waite *v.* O'Neill (1896) 72 Fed. 348.

[24]Talbot *v.* Ford (1842) 3 Sim. 173, 175; Wedgewood *v.* Adams (1843) 6 Beav. 600, 604.

[25]Twining *v.* Morrice (1788) 2 Bro. Ch. C. 326; Dowson *v.* Solomon (1859) 1 Drew. & S. 1.

[26]See Jackson *v.* Stevenson (1892) 156 Mass. 496.

[27]City of London *v.* Nash (1747) 1 Ves. Sr. 12.

[28]Murfeldt *v.* New York etc. R.R. Co. (1886) 102 N. Y. 702; but see Lloyd *v.* London etc. Ry. Co. (1865) 2 DeG. J. & S. 568.

[29]Trustees of Columbia *v.* Thatcher (1882) 87 N. Y. 311.

[1](1878) 75 N. Y. 134; followed in Willis *v.* Smyth (1883) 91 N. Y. 297 and Mabie *v.* Bailey (1884) 95 N. Y. 206.

[2]Mabie *v.* Bailey, *supra.*

[3]Beaver *v.* Beaver (1889) 117 N. Y. 421.